(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 3 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel M Irving for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner indicates that it is a business providing computer services and corporate resources. It seeks to employ the beneficiary permanently in the United States as a management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage from the priority date of the visa petition onward. He denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residence.[1]

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[1] On May 31, 2013, the AAO issued a Notice of Intent to Dismiss, Notice of Derogatory Information and Request for Evidence to the petitioner in which it requested clarification of its business address. The petitioner's June 28, 2013 response provided sufficient evidence to resolve this issue for the purposes of this proceeding.

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted by DOL on October 31, 2011. The proffered wage, as stated on the ETA Form 9089, is $96,400.00 per year. The ETA Form 9089 states that the position requires a master's degree in engineering.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claims to have been established in 2004 and to currently employ 95 U.S. workers. According to the tax returns submitted for the record, the petitioner's fiscal year is based on a calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

As discussed in the director's November 21, 2012 decision, USCIS, in determining a petitioner's ability to pay, first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage during the required period, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[3] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not

[3] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

> represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither an employer's net income nor its net current assets establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonegawa* at 612. In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Where a petitioner has filed multiple petitions for multiple beneficiaries, that petitioner must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. *See Matter of Great Wall* at 144-145; *see also* 8 C.F.R. § 204.5(g)(2). In the instant case, USCIS data bases indicate that multiple Form I-140 and Form I-129 petitions filed by the petitioner were pending or approved in 2011 and 2012. Accordingly, the petitioner must establish its ability to pay the proffered or prevailing wage associated with each petition as of that petition's priority date, regardless of whether the beneficiary was in its employ.

The AAO now turns to a consideration of the extent to which the record on appeal establishes the petitioner's ability to pay the proffered wage from the priority date onward.

In the instant case, Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (Forms W-2) submitted by the petitioner demonstrate that it paid the beneficiary $72,976.00 in 2011 and $56,520.00 in 2012. Accordingly, the record does not establish that the petitioner has paid the beneficiary the proffered wage as of the priority date and the AAO will, therefore, consider whether the record demonstrates that during these years, it was able to pay the difference between the wages paid to the beneficiary and the proffered wage of $96,400.00, a total of $23,424.00 in 2011 and $39,880.00 in 2012.

Ability to Pay 2011

The record contains the petitioner's 2011 federal tax return, which reports net income of $180,405.00 and net current assets of $227,371.00, thereby establishing its ability to pay the $23,424.00 difference between the proffered wage and the income earned by the beneficiary in 2011. The record does not, however, establish either amount as sufficient to pay the proffered wages of all the beneficiaries of the petitioner's Form I-140 petitions approved or pending in 2011.

As proof of its ability to pay the proffered wage, the petitioner, on appeal, submits a chart that includes a list of the Form I-140 beneficiaries it employed in 2011, and the proffered wage and actual wages paid to each of these individuals.[4] While the AAO acknowledges this evidence, it finds that certain information provided by the chart is not documented by the record and that, in other instances, it contradicts that previously provided by the petitioner. It also observes that the proffered wages reflected in the chart for the Form I-140 beneficiaries employed in 2011 are not otherwise documented in the record and that the actual wages paid to three of these Form I-140 beneficiaries are not supported by IRS Forms W-2. The AAO further notes that four 2011 IRS Forms W-2 have been submitted for individuals not listed on the chart. Moreover, the chart does not appear to include the names of five Form I-140 beneficiaries who were listed by the petitioner in a November 14, 2012 response to the director's Request for Evidence (RFE) as unadjusted Form I-140 beneficiaries for whom it had filed in 2011.

Counsel contends that the petitioner's varying employment records are the result of its growth over time and that the reports it has provided represent snapshots of the company at particular times. Counsel's explanation does not, however, explain the petitioner's inconsistent reporting in late 2012 of the number of beneficiaries of Form I-140 petitions approved or pending in 2011. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the AAO also notes that a check of USCIS databases indicates that the beneficiaries of three Form I-140s, approved as of the October 31, 2011 priority date, are not listed on either of the petitioner's charts for 2011. The AAO also finds that in two instances, the proffered wages reflected on the listing of Form I-140 beneficiaries provided in response to the director's RFE are higher than those reflected on the chart submitted on appeal. Where there are inconsistencies in the record, it is incumbent upon the petitioner to resolve them by independent objective evidence. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Accordingly, the record does not reliably establish the number of Form I-140 petitions approved or pending during 2011. Nor does it demonstrate the proffered wages the petitioner was required to pay these beneficiaries, nor the identities of the beneficiaries to whom the petitioner actually paid wages.

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[4] The chart also provides listings of the Form I-140 beneficiaries employed by the petitioner in 2012 and former Form I-140 beneficiaries holding lawful permanent resident status, as well as the beneficiaries of Form I-140 petitions that the petitioner indicates have been denied or withdrawn.

Even if the AAO were to accept the chart submitted on appeal as establishing the actual wages paid to the beneficiaries of all approved and pending Form I-140 petitions in 2011, as well as the proffered wages for each of these individuals, it would not demonstrate the petitioner's ability to pay the proffered wage. The chart submitted by the petitioner on appeal indicates that it paid 16 of the Form I-140 beneficiaries (including the beneficiary in this proceeding) listed as employed during 2011 $352,118.30 less than their combined proffered wages, a difference that exceeds the petitioner's $180,405.00 in net income or $227,371.00 in net current assets for 2011.

Counsel for the petitioner asserts that the difference between the wages paid by the petitioner to its Form I-140 beneficiaries in 2011 and its proffered wage obligation is instead only $187,608.85. Counsel reaches this conclusion by totaling the wages the petitioner paid to all of the Form I-140 beneficiaries on its list, including those who earned income above the proffered wage. However, the higher wages paid to these individuals in 2011 cannot be used to offset the $352,118.30 difference noted above.

To establish its ability to pay the proffered wage in the present case, the petitioner must prove that in addition to its other financial obligations, including all compensation paid to its employees, it had the financial resources to cover the $352,118.30 difference between the wages paid to its 16 Form I-140 beneficiaries who earned less than the proffered wages pegged to their I-140 employment. As neither the petitioner's net income nor its net current assets, when added to the wages it indicates that it paid these 16 individuals, equals or exceeds their combined proffered wages, the petitioner has failed to establish its ability to pay based on its 2011 net income or net current assets.

The AAO notes that the record contains a November 12, 2012 memorandum written by the petitioner's Chief Financial Officer and a June 5, 2012 statement from a certified public accountant regarding the petitioner's financial status in 2011, supported by balance sheets showing the petitioner's assets, liabilities and owner's equity for 2010, 2011 and 2012 (through March 31, 2012). Both of these individuals assert that the petitioner's net assets for 2011 totaled $1,271,482.18,[5] a figure that would significantly exceed the $352,118.30 difference between the wages the petitioner indicates it paid the Form I-140 beneficiaries it employed in 2011 and the proffered wages relating to their Form I-140 employment. The AAO notes, however, that the balance sheets supporting the June 5, 2012 statement indicate that this total reflects a calculation of the petitioner's equity in 2011 rather than its net current assets for 2011, which are considered to be the difference between a petitioner's current assets and current liabilities.[6] An S corporation's year-end net current assets are

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[5] Although, in his statement, the Chief Financial Officer asserts that the petitioner's net current assets for 2011 totaled $1,334,267.00, the AAO finds this to be an inadvertent misstatement, as he indicates that his statement is based on the statement provided by the petitioner's certified public accountant.

[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and

shown on Schedule L, lines 1 through 6 of the Form 1120S, U.S. Tax Return for an S Corporation. Its year-end current liabilities are shown on lines 16 through 18 of this form.

In that the record fails to establish the petitioner's ability to pay the proffered wages of all approved and pending Form I-140 beneficiaries in 2011, the AAO does not find it necessary to consider whether the record contains sufficient evidence to demonstrate that, in 2011, it was able to pay the prevailing wage to all Form I-129 beneficiaries.

Ability to Pay 2012

In its May 31, 2013 Notice of Intent to Dismiss, Notice of Derogatory Information and Request for Evidence, the AAO specifically asked the petitioner to submit copies of its 2012 federal tax return or audited financial records. The petitioner, however, did not provide its 2012 federal tax return in its June 28, 2013 response to the AAO, and did not indicate that it was unable to do so.[7] Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has also failed to submit copies of a 2012 annual report or 2012 audited financial statement for the record. Pursuant to the regulation at 8 C.F.R. 204.5(g)(2), a petitioner seeking to establish its ability to pay must submit tax returns, annual reports or audited financial statements for the period specified.

The petitioner has submitted its payroll records for 2012, which, counsel asserts, reflect its total wage liability for 2012 and establish that it has met and continues to meet substantial wage obligations. However, the petitioner's reliance on wage expenses is misplaced. Proof that a petitioner has met and continues to meet substantial wage obligations does not establish its ability to pay the proffered wage. Without a tax return, annual report or audited financial statement, the petitioner is precluded from demonstrating that its net income or net current assets in 2012 establish its ability to pay.

The petitioner has not established that from the October 30, 2011 priority date onward it had the continuing ability to pay the proffered wage to the beneficiary based on its net income or net current assets. Accordingly, the AAO, pursuant to *Matter of Sonegawa*, will consider whether the record on appeal demonstrates that the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage.

In *Sonegawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately $100,000.00. However, during the year in which the

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salaries). *Id.* at 118.

[7] IRS Publication 509 (2013) relating to tax calendars for use in 2013 indicates that businesses filing Form 1120S calendar year tax returns were required to file their 2012 returns by March 15, 2013. It further states that automatic six-month extensions are available to S Corporations upon the filing of the Form 7004. *See* http://www.irs.gov/publications/p509/ar02.html (accessed July 29, 2013).

petition was filed in that case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new locations for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The legacy Immigration and Naturalization Service (now USCIS) nevertheless found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that she was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed California women, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

In the present case, the record includes the petitioner's tax returns for 2010 and 2011; printed material from the petitioner's website; the previously-noted November 12, 2012 memorandum written by the petitioner's Chief Financial Officer; the previously-noted June 5, 2012 statement from a certified public accountant regarding the petitioner's financial status, supported by balance sheets showing the petitioner's assets, liabilities and owner's equity for 2010, 2011 and 2012 (through March 31, 2012); the petitioner's bank statements from 2012; IRS Forms 941, Employer's Quarterly Federal Tax Returns, reporting Medicare and Social Security wages for 2012; and the petitioner's payroll records for 2012 and through May 2013.

Although the AAO notes the submission of this evidence, it does not find it sufficient to establish that the totality of the petitioner's circumstances demonstrate that it has the ability to pay the proffered wages of all its beneficiaries. Unlike the evidence submitted in *Sonegawa*, the evidence of record in the present case does not establish that the petitioner has a history of strong financial growth or expansion since its founding in 2004. Neither does it demonstrate that the petitioner is a leader within its industry or a business providing unique client services that would indicate a basis for future success. Thus, assessing the totality of the petitioner's circumstances as set forth in the record, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage.

The AAO finds that the evidence of record does not establish the petitioner's ability to pay the proffered wage from the priority date onward. Accordingly, the appeal will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.